No. 5705

IN THE

United States Circuit Court of Appeals

For the Ninth District

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a corporation,

Appellant,

vs.

J. H. HANSON and JENNIE B. HANSON,

Appellees.

BRIEF OF APPELLEES

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TABLE OF AUTHORITIES CITED

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STATEMENT OF FACTS

This case is in its particulars essentially similar to that of Melin, No. 5671. The represented value of the land was $275.00 per acre. Plaintiff made the purchase in November, 1921, and moved onto the land in November, 1922. Shortly thereafter he dug a well pit and struck what he later found out to be hardpan. He went to defendant's horticulturalist and asked about the effect of hardpan upon fruit raising and was advised by him that it was only a volcanic ash and was good for trees. He did, however, advise that some blasting should be done. Plaintiff had invested all of his money in the land and was not able to go into the fruit business until the spring of 1925. He commenced his action in May, 1928, approximately three years after the trees had been planted.

ARGUMENT

I.

THERE WAS NO ERROR IN OVERRULING THE DEMURRER.

We have considered in the Melin case, No. 5671, the points raised by the apellant on demurrer. The complaint in the case at bar is not subject to their criticisms for the further reason that by an amendment thereto plaintiff explained his failure to make discovery sooner. The most important portion of this explanation is that all of his neighbors were living upon lands purchased from the same company by reason of similar representations and were all as ignorant of the facts as were the plaintiffs. More over, no exception was taken to the order overruling the demurrer, hence any error is waived.

German A. I. Co. vs. *Hale,* 219 U. S. 307; 31 Sup. Ct. 246; 55 L. Ed. 29.

II.

THERE WAS NO ERROR IN THE RULING UPON THE QUESTION ASKED THE WITNESS DAVIS.

The incident appears at page 55 of the transcript. The question was as follows: "Can you in some way give us an idea of the extent of your failure over the seven years of your operation?" This was objected to as immaterial and of no foundation. There was absolutely nothing in the question to indicate in what manner the witness would attempt to show the extent of failure in attempting to raise fruit on 150 acres of land similar to that sold to plaintiffs. Appellant did not consider the

matter serious at the time, because no motion was made to strike out the answer nor was any request made of the trial court to have the jury disregard the evidence.

We think the evidence thus elicited was quite proper. By the opening statement the issues had been boiled down to the representation that plaintiffs' land was represented to be well adapted to commercial orcharding and worth $275.00 per acre. The test of any commercial enterprise is the profit or loss sustained by engaging in it over a period of years. The witness Davis had attempted to raise fruit for seven years, and the amount of his profits or losses was of decided importance as showing whether such lands were adapted to the commercial production of fruit. The rule in such matters is set out in the following authorities:

Syllabus. "The admission of evidence which proved irrelevant to the issues finally submitted, and may have been prejudicial to the adverse party, is not ordinarily ground for reversal of a judgment, unless the attention of the court was called to it, and some action asked for to correct its effect."

Southern R. R. Co. vs. *Rogers*, 196 Fed. 286.

"Where the question relates to the tendency of certain testimony to throw light upon a particular fact * * * * there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors.

Moore vs. *U. S.*, 14 Sup. Ct. 26; 150 U. S. 57.

"Where the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on grounds of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other."

Castle vs. *Bullard,* 64 U. S. 172; 16 Sup. Ct. 424.

Complaint is made as to the instruction. It was not excepted to nor was any assignment of error based thereon.

III.

THERE WAS NO ERROR IN THE RULING ON APPELLANT'S MOTION FOR A DIRECTED VERDICT.

It will be noted (Trans. 110) that the motion for a directed verdict was not made immediately upon the close of the evidence but was deferred until after the cause had been argued to the jury. It has been held that putting on of evidence after making such a motion is a waiver thereof, and it would seem that the same reasoning might apply to this case. In the course of the argument, counsel for appellant made certain admissions which appear at page 139 and 140 of the transcript. Briefly, these were that the defendant by its literature represented that the particular piece of land purchased by plaintiffs was proven beyond a doubt to be well adapted to the raising of fruit commercially and that the representation had been made for the purpose of inducing plaintiffs to buy the land. There were other admissions in the course of the argument

which have not been included in the bill of exceptions. Taken together, they serve to change the contentions of the parties somewhat, and it would be unfair to consider the court's ruling upon the motion without taking into consideration all of the admissions made in the course of the argument. The authorities on waiver of a motion of this sort are set out in our brief in the case of Melin, to which reference is made.

Reference to the same brief is also made for a general discussion of the principles relative to the statute of limitation, the only point urged in support of the motion.

The only new argument advanced in this case is that sometime in 1922 or 1923 McNaughton, the appellant's horticultural adviser, told the plaintiffs that the substance in their land was volcanic ash and was beneficial to trees. This is claimed to be in conflict with the statements of the salesman Amblad. The conflict is more apparent than real and simply consists of the application of two different terms to the same substance. Plaintiff is taken to task for going to McNaughton and accepting his information. The pamphlet on which the land was sold to him represented at page 21 that appellant had a competent horticultural adviser, naming this gentleman. A letter from him was published along with his photograph. The letter contained the following statement: "We sometimes advise blasting to shatter this sub-soil, securing better drainage and more freedom for tree roots. As these conditions vary somewhat, it becomes my duty and pleasure to advise * * * * what treatment each individual tract requires."

Under these circumstances, it cannot be said that the statement of McNaughton that blasting this piece was necessary would arouse suspicion in the breast of anyone.

The question of the value of this land and its adaptability to commercial orcharding was sufficiently close to warrant the joining of issues thereon in this trial and those of the other thirty-seven cases. Appellant was able to produce numerous witnesses to support its contention that it had sold plaintiffs good orchard land worth $275.00 per acre. It can hardly be said that these were matters of such common knowledge that plaintiffs must be held to have known the truth concerning them. Both representations were as to matters in which expert opinion was required and upon which experts could, and did, differ.

IV.

THERE WAS NO ERROR IN THE INSTRUCTION ON THE QUESTION OF APPELLANT'S KNOWLEDGE OF THE FALSITY OF THE REPRESENTATIONS.

The complaint is that the court took from the jury the question as to whether appellant knew the falsity of its published statement. This brings us to the question of the form of the representation made. As to this, there can be no question in view of the admission of counsel. (Trans. p. 139-140, already referred to.) Since it is admitted that the representations were positively made, appellant will not be heard to say that it did not know that they were false.

Smith vs. *Richards,* 13 Peters 26; 10 L. Ed. 42.

V.

THERE WAS NO ERROR IN THE DEFINITION OF A "COMMERCIAL ORCHARD."

The criticism of the instruction is first that general language was used. All of the instructions offered by appellant, and none was offered on this point, are subject to the same criticism. Reasonable care and reasonable actions are submitted to the jury in every action for negligence. Since in those cases they are able to determine what is reasonable, it is difficult to understand why they should not understand the meaning of the term when applied to orcharding.

The second criticism attempts to argue that commercial orcharding is not possible upon a ten-acre tract. In this appellant goes in the face of the argument made in all of its pamphlets to the various purchasers. The lands were divided into ten-acre tracts which, says the book, "properly planted to orchard and garden will be all that one man can handle and get the best results." It proceeds to say that they recommend a planting of a small family orchard and one or two kinds of trees on the balance of the tract for commercial purposes. Appellant is estopped to claim that ten-acre tracts are not of sufficient size for a commercial orchard.

VI.

THERE WAS NO ERROR IN THE INSTRUCTIONS CONCERNING THE ADAPTABILITY OF THE SOIL TO RAISING FRUIT.

Under this head appellant seeks to urge that there was some inconsistency in the court's instructions with

reference to blasting. The situation is that the casual reference thereto tucked away in the letter of McNaughton did not call attention to the large amount of blasting that would be required under any theory of the case. Plaintiffs' position was that the land could not be adapted to fruit raising by any reasonable amount of blasting, and defendant contended that the land might be made over into fruit land by this operation. The court's comment upon the subject, contained in the portion of the instructions attacked, was simply a comment upon the evidence and not an instruction as to the law. It was explaining to the jury that the various experts were not wholly in conflict with each other in that one said five feet of soil was necessary and the other group said that the depth could be secured artificially by blasting. The court had advised the jury (Trans. 115) that they were the sole judges of the facts, and any mistake in quoting them or commenting upon them is not available to appellant.

D. & H. Co. vs. *Nahas,* 14 Fed. (2d) 56.

It might be remarked, further, that the statement of McNaughton, which lulled the plaintiffs into security, did not advise them that blasting was an expensive operation. His casual reference thereto in the conversation and, also, in the portion of the letter already quoted was not such as to indicate an operation which might cost as much as $75.00 per acre. If the blasting cost only $10.00 to $15.00 per acre, it might well be so small a cost as not to have any influence upon the plaintiffs.

VII.

THERE WAS NO ERROR IN THE INSTRUCTIONS AS TO THE TIME OF THE DISCOVERY OF THE FRAUD NOR IN THE FAILURE TO GIVE APPELLANT'S PROPOSED INSTRUCTIONS NUMBER I, II and V.

All of the instructions above referred to have to do with the statute of limitations. Numbers I and V, as has been pointed out in other briefs herein, are both erroneous in that they attempt to cast upon plaintiffs the burden of investigating to see if they have been defrauded in the absence of any fact or circumstance putting them upon inquiry.

McMahon vs. *Grimes,* 77 C. D. 356; 275 Pac. 440.

Instructions No. II stated that if plaintiffs discovered a material representation to be false they were at once presumed to have knowledge of the falsity of the other represntations. There was not a scintilla of evidence in this case to show that plaintiffs had made any discovery of the falsity of any representation, so that the instruction was not proper under the evidence of the case.

But the instruction was incorrect for several reasons. It stated that there was a presumption where at most there is a disputable inference. It did not allow them any reasonable time in which to make inquiry and, further, it did not limit the misrepresentation discovered to one relating to the ultimate knowledge in question. It was incorrect for all of these reasons.

The first two objections mentioned are disclosed from an examination of the authorities cited by appellants

for this instruction, and the third is found in

Zeller vs. *Milligan*, 71 Cal. App. 617.

The instructions actually given by the court upon these subjects are found at page 132 to 136 of the transcript. Taken in their entirety, they are a full and correct statement of the law upon the propositions involved.

VIII.

THE EXCEPTIONS TAKEN IN THE TRIAL COURT TO THE INSTRUCTIONS WERE ENTIRELY INSUFFICIENT.

The exceptions taken fall naturally into three groups. All are set out at pages 136 to 138 of the transcript. The first group are all general and relate to the instructions given by the court. In no one of them is any effort made to assist the court to correct its supposed error nor do these refer with such particularity to the portion complained of that it can be identified. Appellant has set out in its specifications of error long excerpts from the instructions given. In hardly any instance has it cited all that the court said upon the given subject. Most of the instructions covered several propositions of law, at least one of which is not even attacked. None of these exceptions is sufficient.

Killisnoo Packing Co. vs. *Scott*, 14 Fed. (2d) 86.
Jones vs. *U. S.*, 265 Fed. 235.

The next group are exceptions to the refusal of the court to give instructions proposed by appellant. These are subjects to the same objection. They only refer to the proposed instructions by numbers and give a brief reference to the subject-matter of the instruction

proposed. In no instance do they call attention of the court to the particular portion thereof which is claimed to have been omitted and in every case they fail to state the law correctly when it is considered with reference to the facts of the instant case. They, likewise, are insufficient.

Alaska Steamship Co. vs. *Katzeek,* 16 Fed (2d) 210.

By the last two exceptions, appellant attempted to challenge the court's instruction that the booklet represented plaintiffs' land to be adapted to the growing of deciduous fruit commercially. As we have already pointed out in this brief, in the course of the argument appellant admitted not only that the representations referred to this particular piece of land but, further, admitted that it had represented that the land was proven beyond a doubt to be well adapted to the raising of fruit commercially. How appellant could be injured by the court's stating what its counsel had already admitted to the jury is difficult to understand. Indeed, we do not understand it.

CONCLUSION

We can find nothing in this case to single it out and distinguish it from the cases which went before. The assignments of error are slightly different. Most of them are hypertechnical. The matters complained of are not likely to have influenced the jury, who were familiar with lands of the type involved and under the facts could have come to no other conclusion. The exceptions noted to the instructions are all insufficient to bring the matter before an appellate court. There are

additional specifications of error, but we have not attempted to reply to any of those on which no argument was advanced.

Respectfully submitted,

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